

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC02-2158

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ROBERT PATTON,

Petitioner,

v.

MICHAEL W. MOORE,

Secretary, Florida Department of Corrections,

Respondent.

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PETITION FOR WRIT OF HABEAS CORPUS

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TODD G. SCHER  
Special Assistant CCRC  
Florida Bar No. 0899641  
555 NE 34<sup>th</sup> Street, #1510  
Miami, Florida 33137  
(305) 576-3221

SUZANNE MYERS  
Assistant CCRC  
Florida Bar No. 0150177  
OFFICE OF THE CAPITAL  
COLLATERAL REGIONAL COUNSEL  
101 N.E. 3RD AVE., SUITE 400  
Ft. Lauderdale, FL 33301  
(954) 713-1284

COUNSEL FOR PETITIONER

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### **INTRODUCTION**

This petition for habeas corpus relief is being filed in order to address substantial claims of error under the fourth, fifth, sixth, eighth and fourteenth amendments to the United States Constitution, claims demonstrating that Mr. Patton was deprived of the effective assistance of counsel on direct appeal and that the proceedings that resulted in his convictions, death sentence and other sentences, as well as the affirmance of those convictions and sentences, violated fundamental constitutional guarantees.

Citations to the Record on the Direct Appeal shall be as (R. page number). Citations to the Record on the Resentencing Appeal shall be as (RS. Page number). All other citations shall be self-explanatory.

### **JURISDICTION**

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. This Court has original jurisdiction under Fla. R. App. P. 9.030(a) (3) and Article V, § 3(b) (9), Fla. Const. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const.

### **REQUEST FOR ORAL ARGUMENT**

Mr. Patton requests oral argument on this petition.

### PROCEDURAL HISTORY

Mr. Patton was charged by indictment with one count of grand theft in the second degree, one count of first degree murder, and one count of armed robbery (RS. 3335). Trial commenced on February 16, 1982, and a verdict was returned on February 22, 1982 (R. 1528-29). Subsequent to the evidentiary portion of the penalty phase, the jury was instructed to consider nine (9) statutory aggravating circumstances: under sentence of imprisonment, prior violent felony, great risk of death to many persons, during the course of a felony, avoiding arrest, pecuniary gain, disrupt or hinder the lawful exercise of government, especially wicked, evil, atrocious, or cruel, and cold, calculated, and premeditated (R. 1762-65).<sup>1</sup> The jury returned a recommendation of 6-6 (R. 1773). The court refused to accept the vote as a recommendation of life and instead gave the jurors an Allen charge (R. 1779-81).<sup>2</sup> The jury then returned with a 7-5 death recommendation (R. 1785),

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<sup>1</sup>The original jury was instructed that it could not double up on aggravating circumstances, that is, it was instructed that "the State may not rely upon a single aspect of the offense to establish more than a single aggravating circumstance; therefore, if you find that two or more of the aggravating circumstances are supported by a single aspect of the offense, you may only consider that offense as supporting a single aggravating circumstance" (R. 1765). As addressed in Claims I and II, the resentencing jury was *not* instructed on the doubling issue.

<sup>2</sup>See Allen v. United States, 164 U.S. 492 (1896).

which the trial court followed and imposed death after making the necessary findings of aggravation and mitigation (R. 558-68).<sup>3</sup> On appeal, this Court affirmed Mr. Patton's convictions but remanded for a resentencing due to the error in giving the Allen charge. Patten v. State, 467 So. 2d 975 (Fla.), cert. denied, 474 U.S. 876 (1985) [Patten I]. Specifically, the Court held as to this point:

We do not find it appropriate to treat the jury recommendation as a life recommendation and the trial judge's sentence as a jury override, as urged by the state. There was no life recommendation in this case and the trial court did not, therefore, consider this significant factor in his sentencing decision. To now treat the jury recommendation as a life recommendation and review appellant's sentence without the benefit of the trial judge's consideration and application of the Tedder doctrine would require this Court to make an assumption as to what sentence the trial judge would have imposed if the jury had actually returned a life recommendation. We decline to do so.

Patten I at 980 (footnote omitted).<sup>4</sup>

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<sup>3</sup>In aggravation, the trial court found that (1) Mr. Patton was previously convicted of a violent felony, (2) avoiding arrest, and (3) cold, calculated, and premeditated (R. 559-61). The court also found the disruption of governmental function aggravator, but determined that it would be merged with the avoiding arrest factor and thus did not consider it (R. 560). The court made factual findings rejecting the remaining aggravating factors on which the jury was instructed.

<sup>4</sup> Justice Marshall, dissenting from the denial of certiorari, wrote that he would grant review of whether the Double Jeopardy Clause barred the State from forcing Mr. Patton to again face the death penalty after the original jury

Resentencing commenced on April 29, 1989, and on May 4, 1989, the jury returned a death recommendation by a vote of 11-1 after being instructed this time on three (3) aggravating circumstances: avoiding arrest, disruption or hindrance of governmental function, and prior violent felony (RS. 3267; 3293).<sup>5</sup> After making the necessary findings of aggravation and mitigation, the trial court imposed death (RS. 3837-40).<sup>6</sup> This Court affirmed. Patten v. State, 598 So. 2d 60 (Fla. 1992), *cert. denied*, 507 U.S. 1019 (1993) [Patten II].

Mr. Patton filed a motion for postconviction relief pursuant to Fla. R. Crim. P. 3.850. After the lower court summarily denied the motion, this Court reversed in part and remanded for an evidentiary hearing on various issues. Patton v. State, 784 So. 2d 380 (Fla. 2000) [Patten III].<sup>7</sup> The returned a 6-6 recommendation. Patten v. Florida, 474 U.S. at 876-77 (Marshall, J., dissenting).

<sup>5</sup>Unlike the original jury, the resentencing jury was *not* instructed that it could not double up on aggravating factors supported by only the same aspect of the offense. This was one of more hotly-debated issues at the resentencing.

<sup>6</sup>This time, the trial court found two aggravating circumstances: Mr. Patton's prior 1975 armed robbery and contemporaneous conviction for armed robbery, and hindrance of lawful exercise of a governmental function (RS. 3838).

<sup>7</sup>In a motion for rehearing, Mr. Patton urged, among other things, that the Court grant him leave to file supplemental briefing in light of Apprendi v. New Jersey, 530 U.S. 466 (2000), and how Apprendi affected Mr. Patton's case,

evidentiary hearing was held, and relief was denied. The appeal from that case is pending before this Court, and this petition is being filed simultaneously with the Initial Brief.<sup>8</sup>

#### CLAIM I

**MANY OF THIS COURT'S PRIOR RULINGS IN MR. PATTON'S CASE MUST BE REVISITED IN LIGHT OF RING V. ARIZONA.**

**A. INTRODUCTION—THE RING DECISION.**In Ring v. Arizona,

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S. Ct. 2428 (2002), the Supreme Court held the Arizona capital sentencing scheme unconstitutional because a death sentence there is contingent upon finding an aggravating circumstance, and the Arizona scheme assigns responsibility for finding that circumstance to the judge rather than the jury. Because aggravating circumstances are "the functional equivalent of an element of a greater offense [of capital murder," the Court

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particularly the issue of the 6-6 jury recommendation at the original sentencing phase. Over Justice Pariente's dissent, the Court denied supplemental briefing on the Appendi issue.

<sup>8</sup> Following this Court's decision in Mann v. Moore, 794 So. 2d 595 (Fla. 2001), Mr. Patton filed a request in this Court to file his habeas petition along with any appeal from the 3.850 proceedings which at the time were pending in the circuit court. On January 24, 2002, the Court entered an order granting Mr. Patton leave to file his petition for state habeas corpus "no later than the date the initial brief appealing the lower tribunal's order on the defendant's application for relief under Florida Rule of Criminal Procedure 3.850 is due." Accordingly, this petition is timely filed.

held that the Sixth Amendment required that the aggravating circumstances be found by a jury. Id. at 2443 (quoting Apprendi v. New Jersey, 530 U.S. 466, 494 n.19 (2000)).<sup>9</sup>

Thus, capital sentencing schemes such as those in Florida and Arizona violate the notice and jury trial rights guaranteed by the Sixth and Fourteenth Amendments because they do not allow a jury to reach a verdict with respect to a fact that is an element of the aggravated offense that is punishable by death.

Applying Apprendi in Ring, the Court observed that “[t]he dispositive question . . . is not one of form but of effect.” Ring, 122 S. Ct. at 2440 (quoting Apprendi, 530 U.S. at 494). Thus, the question is not whether death is an authorized punishment in first-degree murder cases, or whether “a capital felony is by definition a felony that may be punishable by death,” Mills v. Moore, 786 So. 2d 532, 538 (Fla. 2001), but instead, whether the “facts increasing punishment beyond the maximum authorized by a guilty verdict standing alone” are found by the judge or jury. Ring, 122 S.Ct. at 2441. In other words, “[i]f a state makes an

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<sup>9</sup>In Apprendi, the Court had held that “[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed.” Apprendi, 530 U.S. at 490 (quoting Jones v. United States, 526 U.S. 227, 252-53 (1999)(Stevens, J., concurring)).

increase in a defendant's authorized punishment contingent on the finding of a fact, that fact—no matter how the State labels it—must be found by a jury beyond a reasonable doubt." Id. at 2439. Accordingly, the Arizona's sentencing scheme could not survive because "[a] defendant convicted of first-degree murder in Arizona cannot receive a death sentence unless a judge makes the factual determination that a statutory aggravating factor exists. Without that critical finding, the maximum sentence to which the defendant is exposed is life imprisonment, and not the death penalty." Id. at 2436. The Court overruled Walton v. Arizona, 497 U.S. 639 (1990), "to the extent that it allows a sentencing judge sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." Ring, 122 S. Ct. at 2443.

**B. RING APPLIES TO FLORIDA'S CAPITAL SCHEME.** This Court has previously held that "[b]ecause Apprendi did not overrule Walton, the basic scheme in Florida is not overruled either." Mills v. Moore, 786 So. 2d 532, 537 (Fla. 2001). However, Ring overruled Walton, as well as the basic principle of Hildwin v. Florida, 490 U.S. 638 (1989), which had upheld the Florida scheme on the ground that "the Sixth Amendment does not require that the specific findings authorizing imposition

of the sentence of death be made by the jury.'" Ring, 122 S. Ct. at 2437 (quoting Walton, 497 U.S. at 648; Hildwin, 490 U.S. at 640). Additionally, Ring undermines this Court's opinion in Mills by establishing (a) that Apprendi applies to capital sentencing schemes,<sup>10</sup> (b) states may not avoid the Sixth Amendment requirements of Apprendi by simply specifying "life or death" as the only sentencing options, and (c) that the relevant and dispositive question is whether, under state law, death is "authorized by a guilty verdict standing alone." Ring, 122 S. Ct. at 2441.

**C. MR. PATTON WAS DENIED HIS SIXTH AND FOURTEENTH AMENDMENT RIGHTS.**

By virtue of Ring and its application to Florida law, various constitutional errors that occurred in the proceedings are now revealed and require the entry of an order vacating the sentence of death. Many of the issues implicated by Ring were previously rejected by both the trial courts in this case and by this Court. This Court has the jurisdiction and authority to re-analyze these issues in light of Ring.<sup>11</sup> See,

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<sup>10</sup>In Mills, this Court held that "the plain language of Apprendi indicates that the case is not intended to apply to capital [sentencing] schemes." Mills, 786 So. 2d at 537. Clearly, Ring establishes that this Court was wrong in Mills.

<sup>11</sup>Mr. Patton submits that Ring is new law warranting application pursuant to Witt v. State, 387 So. 2d 922 (Fla. 1980).

e.g. Arizona v. California, 103 S. Ct. 1382, 1391 n.8 (1983) (“it is not improper for a court to depart from a prior holding if convinced that it is clearly erroneous and would work a manifest injustice”). This Court’s jurisdiction over an appeal necessarily includes the “authority to change the law of the case previously set forth.” Jones v. State, 559 So. 2d 204, 206 (Fla. 1990). Accord Brunner Enterprises v. Dep’t. of Revenue, 452 So. 2d 550 (Fla. 1984). This Court has not hesitated to apply intervening changes in law or intervening legislation whether they inure to the benefit of the State, see State v. Owen, 696 So. 2d 715 (Fla. 1997); Trotter v. State, 690 So. 2d 1234 (Fla. 1996), or to a criminal defendant. See, e.g. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987).

**1. The Jury Override Issue.** At the original penalty phase proceedings, Mr. Patton’s jury returned with a note indicating that it had reached a recommendation of six to six as to the penalty, and asked “what now” (R. 1773). Over defense objection, the court proceeded to give an Allen charge (R. 1779-80). The jury foreman then inquired whether a majority vote was required for a life recommendation (R. 1780). The court responded that it did not know what the

law was, that the jury should continue deliberating, and that if a majority could not be reached it would accept the six to six vote (R. 1781-82). Thirty minutes later, the jury returned with a seven to five recommendation for death (R. 1783; 1785). On appeal, this Court reversed for a jury resentencing, holding that the trial court erred in giving the Allen charge but declining to find that the six to six recommendation constituted a valid recommendation of life. Patton I at 980.<sup>12</sup>

Prior to the resentencing, Mr. Patton re-raised the issue of the prior jury recommendation. Initially, Mr. Patton filed a request with the trial court to accept the prior jury recommendation; this request was denied (RS. 3360-62),<sup>13</sup> and a

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<sup>12</sup>The State's position on appeal was that the trial court did err in giving the Allen charge but that the death sentence should nonetheless be affirmed because "the ultimate decision as to whether the death penalty should be imposed rests with the trial judge" and "the trial court's sentencing order specifically sets forth the trial court's findings that two aggravating circumstances were present and that there were no mitigating factors" (Brief of Appellee, Patton v. State, No. 61,945, at 52). In the alternative, the State also suggested that the jury's recommendation be treated as a valid life recommendation, but, under Tedder v. State, 322 So. 2d 908 (Fla. 1975), the "override" should be sustained because "the facts which are set forth in the [judge's sentencing] order and the trial court's independent findings are sufficient" to meet the Tedder test (Brief of Appellee at 55). Both of these positions are at odds with the rule of Ring.

<sup>13</sup>The record also contains an order vacating the order denying the motion to accept the prior jury recommendation (RS. 3663).

writ of prohibition was taken to this Court and subsequently denied on the double jeopardy issue. Patten v. Morphonios, 492 So. 2d 1334 (Fla. 1986). During the resentencing proceedings, defense counsel again urged the court to "review this based on the prior jury verdict as opposed to the present jury verdict" and analyze Mr. Patton's sentence under the jury override standards (RS. 3309-10). On appeal, Mr. Patton again urged that the Court's prior determination regarding the jury recommendation was in error (Brief of Appellant, Patten v. State, No. 74-318, at 66-67). In response, the State asserted that the issue had already been decided in the prior appeal, noting that Mr. Patton "is certainly unlucky to have had his trial occur before this Court's decision in Rose v. State, 425 SO. 2d 521 (Fla. 1983), however, bad luck is not grounds for setting aside the instant sentence" (Brief of Appellee, Patten v. State, No. 74-318, at 92). In its opinion affirming Mr. Patton's sentence of death, the Court rejected these arguments, holding that "[w]e resolved this issue in our prior Patten decision and decline to readdress it in this proceeding." Patten II at 63.<sup>14</sup>

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<sup>14</sup>In a motion for rehearing, Mr. Patton's appellate counsel, addressing the jury recommendation issue, argued that Mr. Patton's "entitlement to a life recommendation flows from the fact that a trial judge has no authority to reject a jury's favorable treatment of a defendant. When the trial judge exceeded his authority and improperly rejected the

Finally, in his Rule 3.850 proceedings, Mr. Patton once again raised the issue of this Court's prior assessment of the first jury recommendation. The Court did not address the issue as it had been raised on direct appeal. Patton III at 386 nn. 3, 4. In dissent, however, then-Justice Anstead wrote that a "fundamental injustice" occurred as to the jury recommendation issue, and that the Court's prior rejection of the claim was "patently erroneous." Patton III at 396 (Anstead, J., concurring in part and dissenting in part).

Under Apprendi and Ring, Mr. Patton's original jury recommendation should have been a binding life recommendation, and the trial judge should not have been permitted to ignore the acquittal returned by the jury as to death eligibility and make his own findings with respect to the existence of aggravating factors and the weighing process required to determine death eligibility under Florida law. Several members of the Court have expressed concern about the Apprendi/Ring implications on Florida's statute permitting jury overrides. See Mills v. Moore, 786 So. 2d 532, 545 n.8

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jury's decision making process, Patten became entitled to the benefit of the jury's clearly stated recommendation" (Appellant's Motion for Rehearing, Patten v. State, No. 74-318, at 9-10). Appellate counsel also argued that "the judge is not authorized to prevent the return of a verdict in a criminal case" and that, in Mr. Patton's case, "there was no verdict in the sense that none of the formalities attendant to the return and entry of a verdict took place" (Id. at 10-11).

(Fla. 2001) (Pariente, J., dissenting) ("a jury recommendation of life might, under a logical extension of the reasoning in Apprendi, preclude a trial court from overriding a jury's life recommendation")<sup>15</sup>; Bottoson v. Moore, 2002 Fla. LEXIS 1474 at \*17 (Fla. July 8, 2002) (Pariente, J., concurring) ("Ring casts substantial doubt on the constitutionality of our scheme to the extent that it permits a judge to override a jury recommendation of a life sentence. When a jury recommends a life sentence, the trial court and this Court have no way of knowing whether or not the jury has found the existence of any aggravators or has found that the mitigating circumstances outweigh the aggravators. Although a life recommendation is not involved in this case, we need to determine if that aspect of the statute can be addressed without rendering the entire scheme unconstitutional").

Under Ring and Apprendi, Florida's override scheme cannot stand, and Mr. Patton's sentence of death must be vacated and he must be given the benefit of his original recommendation of life. Under Ring and Apprendi, a jury must make the necessary findings under Florida's capital sentencing statute in order to comport with due process and the Sixth Amendment. However,

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<sup>15</sup>Then-Justice Anstead and Justice Shaw concurred in Justice Pariente's dissenting opinion.

"[t]he Florida death penalty procedure is not based on a controlling jury recommendation concerning sentencing," but rather is "advisory only." Spaziano v. State, 433 So. 2d 508, 511-12 (Fla. 1983). See also Spaziano v. Florida, 468 U.S. 447 (1984). Contrary to the constitutional underpinnings of Ring and Apprendi, because Florida juries do not make factual findings as to death eligibility factors and their "recommendation" is "advisory only," a trial court's ability to override a jury's sentencing recommendation violates the Sixth and Fourteenth Amendments. Once Mr. Patton's jury returned with a six to six decision, Mr. Patton was acquitted of the death penalty.

Mr. Patton recognizes that the Supreme Court upheld the constitutionality of Florida's override scheme in Spaziano v. Florida, 468 U.S. 447 (1984). Spaziano addressed various constitutional attacks on Florida's override scheme, including an Eighth Amendment challenge, a Double Jeopardy challenge, and a Sixth Amendment trial by jury challenge. That decision, as well as this Court's underlying Spaziano opinion, must be revisited in light of Apprendi and Ring. The Supreme Court in Spaziano determined that while a capital sentencing proceeding is "like a trial" for Double Jeopardy purposes, this "does not mean that it is like a trial in respects significant to the

Sixth Amendment's guarantee of a fair trial." Spaziano, 468 U.S. at 459. Certainly, the Spaziano Court's conclusion that "[t]he Sixth Amendment never has been thought to guarantee a right to a jury determination of that issue" is in irreconcilable conflict with Ring and Apprendi.

Because the jury returned with a six to six recommendation, under Florida law it acquitted Mr. Patton of the death penalty as it never "found" anything required to make Mr. Patton death eligible under Florida law. Florida's capital sentencing statute makes imposition of the death penalty contingent upon factual findings made after a verdict finding the defendant guilty of first-degree murder. Section 775.082 of the Florida Statutes provides that a person convicted of first-degree murder "shall" be sentenced to life imprisonment "unless the proceedings held to determine sentence according to the procedure set forth in [Section] 921.141 result in *findings by the court* that such person shall be punished by death."

Florida Statute Section 921.141 (3) requires the trial judge to make three factual determinations before a death sentence may be imposed. The trial judge (1) must find the existence of at least one aggravating circumstance, (2) must find that "*sufficient* aggravating *circumstances* exist" to

justify imposition of death, and (3) must find that "there are insufficient mitigating circumstances to outweigh the aggravating circumstances." If the judge does not make these findings, "the court *shall* impose a sentence of life imprisonment in accordance with [Section] 775.082." Id. (emphasis added). Because Florida's death penalty statute makes imposition of a death sentence contingent upon these findings and gives sole responsibility for making these findings to the trial judge, it violates the Sixth Amendment.

Florida law does provide for the jury to hear evidence and render "an advisory sentence." Section 921.141 (2), Fla. Stat. However, the jury's role does not satisfy the Sixth Amendment under Ring and Apprendi. Section 921.141 (2) does not require a jury verdict, but rather an "advisory sentence."<sup>16</sup> A Florida penalty phase jury does not make fact findings.<sup>17</sup> A Florida penalty phase jury is not required to reach a verdict on any one of the three factual determinations

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<sup>16</sup>Indeed, during Mr. Patton's resentencing proceedings, the trial court noted as much. When discussing the forms that the jurors were to complete upon concluding their deliberations, the court made the following statement: "The first verdict has the case number, the State of Florida versus Robert Patton. *It is actually—I shouldn't call it a verdict form. It's an advisory sentence*" (RS. 3277) (emphasis added).

<sup>17</sup>"A Florida trial court no more has the assistance of a jury's findings of fact with respect to sentencing issues than does a trial judge in Arizona." Walton, 497 U.S. at 648.

required before a death sentence may be imposed. See Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., concurring) (“[U]nder section 921.141, the jury’s advisory recommendation is not supported by findings of fact”). Certainly, Florida does not require a penalty phase jury to return a unanimous verdict.<sup>18</sup> Rather, Florida law requires that the trial judge’s findings be made independently of the jury’s recommendation and notwithstanding the jury vote. See Grossman v. State, 525 So. 2d 833, 840 (Fla. 1988). This Court’s review of a death sentence is based and dependent upon only the trial judge’s written findings. Morton v. State, 789 So. 2d 324, 333 (Fla. 2001); Grossman, 525 So. 2d at 839; State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973).

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<sup>18</sup>As to the elements of an offense, this Court has recognized that a judge may not make fact findings “on matters associated with the criminal episode” because that “would be an invasion of the jury’s historical function.” State v. Overfelt, 457 SO. 2d 1385, 1387 (Fla. 1984). Under Fla. R. Crim. P. 3.440, a jury verdict on the elements of a criminal charge must be unanimous. Since jury unanimity has long been the practice in Florida, it is “settled that “[i]n this state, the verdict of the jury must be unanimous’ and that any interference with this right denies the defendant a fair trial.” Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992) (quoting Jones v. State, 92 So. 2d 261 (Fla. 1956)). However, this Court has approved allowing the jury to recommend a death sentence based on a simple majority vote. See, e.g. Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). The Court has also not required unanimity as to the existence of specific aggravating factors. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). Taken together, Ring and Florida law establish that the penalty phase jury’s vote on the three factual determinations is required to be unanimous.

Mr. Patton certainly cannot be faulted for the failure of his jury to make the three findings of fact which are a prerequisite to finding that death can be imposed under Florida law. During the original sentencing proceedings, defense counsel made the following request:

MS. LYONS: Your Honor, we would also—I don't believe it was submitted in our requested instructions, but we would ask that the verdict form submitted by the jury list if they make any findings recommending the death penalty—list the specific aggravating and mitigating circumstances that they considered.

THE COURT: Request denied.

(R. 1618). See also R. 1719 ("your request as to specific factual finding as to mitigating and aggravating is denied"). On appeal, Mr. Patton challenged the lower court's refusal to require the jury to make factual findings:

Finally, lack of specific findings meant that it is impossible to know if a majority of the jurors agree on the same aggravating and mitigating factors. It is possible that seven jurors can vote for death, and that each juror can believe, beyond a reasonable doubt, that a different aggravating factor exists. Likewise, it is possible for the jurors to disagree on the mitigating factors and still render a decision. As a result, each juror may be voting for life or death based on different factors. The Standard Jury Instructions do not instruct the jury that they must agree with each other on specific factors. Indeed, the jury is told that its advisory sentence need not be unanimous, and that it is voting on life or death, without agreeing to any particular aggravating or mitigating factors. If

the jury had been instructed to return specific findings none of these problems would exist.

(Brief of Appellant, Patten v. State, No. 61,945, at 52-53).

In response, the State argued:

The jury is not required to make specific findings as to the existence of aggravating and mitigating circumstances, nor is a trial judge required to instruct a jury to do so. No such requirement is enumerated in Sec. 921.141, Fla. Stat., nor does case law mandate it. In Florida, the jury's function in the penalty phase is purely advisory. The ultimate decision as to the imposition of the sentence rests with the trial judge.

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[I]t is the trial judge who must justify the sentence with written findings. It therefore follows that it would not serve any purpose under the statute and its interpretation to require the jury to make specific findings as to the aggravating and mitigating circumstances.

\* \* \*

Appellant's final assertion as to this issue is that lack of specific findings make it impossible to know if a majority of jurors agree as to the existence or absence of aggravating and mitigating factors. Once again, Appellee notes that it is not the jury's function to reach either a majority or unanimous decision as to which factors do or do not exist. The Florida system has provided the trial judge with this role.

(Brief of Appellee, Patten v. State, No. 61,945, at 58)

(emphasis in original). On appeal, the Court did not address this point, presumably in light of the reversal for a new sentencing proceeding.

Mr. Patton re-raised this issue at his resentencing. In addition to adopting the all the previously filed motions, defense counsel argued for a special verdict form, particularly in order to ascertain whether the jury was double-counting any aggravating circumstances (RS. 2913 *et. Seq*). During the course of this discussion, the following observation was made:

MR. FINE [defense counsel] But, there has never been a factual determination that they [aggravating and mitigating factors] did or did not exist.

THE COURT: There never is. When they come back, they come back with life or death. They don't tell me why, right? So, what difference does it make?

(RS. 2923). Soon thereafter, during arguments about providing the jury with verdict forms for the aggravating factors, the trial court again observed that "it doesn't really matter" what the jury determines in terms of aggravating factors "because I am the one that decides that" (RS. 2930). Defense counsel responded to this statement:

MR. FINE: It sure does matter, because you are giving great deference to what they do and if they improperly weigh, because they are adding another aggravating circumstance when it is improper, because it is based on the same set of facts, we have a tainted jury recommendation.

THE COURT: I will think about that.

(RS. 2930-31). The trial court then noted that “[a] judge can override a jury’s recommendation, in any event” and that “the only question that matters is what are the facts, what is the evidence, what are the aggravating circumstances,” observing that the jurors “never get into those” (RS. 2931-32). The defense reiterated that “[w]e ask for a special verdict form giving the jury a list and asking them to tell us what aggravating they find and what mitigating they find” (RS. 2932-33). The request was again denied (RS. 2933), as was a special limiting instruction proposed by the defense on the issue of doubling (R. 2978).<sup>19</sup> The same request was renewed and denied at a later point during the proceedings (RS. 3018).

On appeal from his resentencing, Mr. Patton’s appellate counsel set forth in Argument I of the Initial Brief that the lower court erred in failing to submit special verdict forms to the jury. Included among the arguments set forth was the following:

By simply submitting to the jury a special verdict form wherein the jury could indicate its findings with respect to the involved aggravating and mitigating factors and how it weighed them, the great gap in Florida’s statutory death penalty could have been closed and it is this [Defendant’s] contention that therefore he was denied a fair trial

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<sup>19</sup>The doubling issue was raised on direct appeal from the resentencing, but the Court determined that no instruction was requested on the issue of doubling. Patton, 598 So. 2d at 63 n.3. This is factually incorrect, as discussed *infra*.

and the due process of law under the federal and state constitutions by both the statutory deficiency and by the court's failure to seize the moment to cure that deficiency in this case.

(Brief of Appellant, Patten v. State, No. 74-318, at 46). In response, the State offered the following argument *in toto*:

It is certainly commendable that the defendant has taken it upon himself to attempt to rewrite Fla. Stat. 921.141 (2) & (3). However, the State respectfully asserts that perhaps such revisions should await legislative action. Pending such developments, the instant claim should be steadfastly rejected. The logistics of a vote on each aggravating and mitigating factor, including nonstatutory mitigating factors, and how such vote tallies would be converted to a final recommendation, is the stuff of which nightmares are made.

(Brief of Appellee, Patten v. State, No. 74-318, at 59). In the opinion affirming Mr. Patton's sentence, the Court held:

In his first claim, Patten contends that Florida's death penalty procedure is unconstitutional because it does not require the sentencing jury to report in detail what decisions it reached with respect to each of the aggravating and mitigating circumstances. Patten claims that a special verdict form must be utilized so that a jury may indicate which aggravating and mitigating circumstances it found applicable and how it weighed them. We find no constitutional or statutory requirement that mandates the use of a special verdict form in death penalty cases. Accordingly, we find this claim to be without merit.

Patten II at 62.

Thus, it could not be clearer that Mr. Patton fully appraised the lower court and this Court of the constitutional

problems attendant to Florida's capital scheme, arguments which coincide with the principles announced in Ring and Apprendi. See Bottoson v. Moore, 2002 Fla. LEXIS 1474 at \*18 (Fla. July 8, 2002) (Pariente, J., concurring) ("The question also arises as to whether any or all of these problems could be solved by requiring the use of a special verdict where the jury would be required to make 'findings' of the existence of the aggravating circumstances before making its ultimate 'recommendation' as to whether the death penalty should be imposed"). Because Mr. Patton's original jury failed to make the necessary findings with respect to death eligibility, and indeed acquitted Mr. Patton of the death penalty, he is entitled to relief under Ring and to the benefit of the life recommendation. Because Ring necessarily invalidates Mr. Patton's sentence as to the original proceeding, it certainly invalidates the resentencing proceedings, as the same constitutional errors plagued that proceeding (as demonstrated in this petition).<sup>20</sup> The resentencing jury did not have any more role in making the required factual findings under Florida's capital scheme than the original sentencing jury.<sup>21</sup>

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<sup>20</sup>Ring does not only implicate jury override situations, but rather affects Florida's capital sentencing scheme *in toto*. See generally Bottoson v. Moore, 2002 Fla. LEXIS 1474 (Fla. July 8, 2002).

<sup>21</sup>In fact, the resentencing jury was plagued with additional Sixth Amendment problems under Ring. For example,

Habeas relief should issue, as this Court's prior determination of the jury override issue cannot stand under Ring.

**2. The indictment against Mr. Patton failed to include all of the elements of the offense of capital murder.**

Prior to his first trial, Mr. Patton filed a Motion to Dismiss the Indictment or in the Alternative to Declare that Death is Not a Possible Penalty (R. 142). In pertinent part, the motion alleged that under Fla. Stat. 775.082, the penalty for first-degree murder was life imprisonment, and that under Fla. Stat. 941.141 (5), the aggravating circumstances were essential elements of the offense which needed to be alleged in the indictment pursuant to the Florida and Federal constitutions (R. 144). Because the indictment failed to allege the elements of first degree murder necessary to make death a possible penalty, the indictment was constitutionally defective (Id.). Mr. Patton also filed a pre-trial motion for a Statement of Aggravating Circumstances, alleging that the indictment failed to set forth which statutory aggravating factors the State intended to rely on, in violation of the Florida and Federal Constitutions (R. 94-96). The motion to dismiss the indictment was denied in a written order (R.

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it was not provided a doubling instruction. See infra.

188);<sup>22</sup> the motion for statement of aggravating circumstances was orally denied (T. Hearing Jan. 6, 1982; R. 121-23). Prior to Mr. Patton's resentencing, defense counsel moved to adopt all the pretrial motions filed in the first proceeding, including the motion to dismiss the indictment and the motion for a statement of aggravating circumstances (RS. 3475-77).

The Supreme Court in Jones v. United States, 526 U.S. 227 (1999), held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Id. at 243 n.6. Apprendi held that the Fourteenth Amendment affords citizens the same protections when they are prosecuted under state law. Apprendi, 530 U.S. at 475-76.<sup>23</sup> In Ring, the Supreme Court held that a death penalty statute's aggravating circumstances operate as "the

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<sup>22</sup>At a hearing on the motion to dismiss, defense counsel argued, in conformity with the written motion, that "if the aggravating circumstances and other types of offenses are not contained in the indictment,[] even though the person can be charged with the offense, he cannot be sentenced to the aggravated sentence" (T. Hearing Jan. 22, 1982; R. 133-34). The motion was orally denied without any argument from the State (Id. at 135).

<sup>23</sup>The grand jury clause of the Fifth Amendment has not been held to apply to the States. Apprendi, 530 U.S. at 477 n.3.

functional equivalent of an element or a greater offense.”  
Ring, 122 S. Ct. at 2443 (quoting Apprendi, 530 U.S. at 494,  
n. 19).

In Jones, the Supreme Court noted that “[m]uch turns on  
the determination that a fact is an element of an offense,  
rather than a sentencing consideration,” in significant part  
because “elements must be charged in the indictment.” Jones,  
526 U.S. at 232. After the decision in Ring, the Supreme  
Court overturned the death sentence imposed in United States  
v. Allen, 247 F.3d 741 (8<sup>th</sup> Cir. 2001), granted certiorari,  
vacated the judgment and remanded the case for reconsideration  
in light of Ring’s holding that aggravating factors that are  
prerequisites of a death sentence must be treated as elements  
of the offense. Allen v. United States, 122 S.Ct. 2653  
(2002). The question presented in Allen was this:

Whether aggravating factors required for a sentence  
of death under the Federal Death Penalty Act of  
1994, 18 U.S.C. § 3591 et seq., are elements of a  
capital crime and thus must be alleged in the  
indictment in order to comply with the Due Process  
and Grand Jury clauses of the Fifth Amendment.

The Eighth Circuit had previously rejected Allen’s argument  
because in its view that aggravators are not elements of  
federal capital murder but rather “sentencing protections that  
shield a defendant from automatically receiving the statutorily

authorized death sentence." United States v. Allen, 247 F.3d at 763.

Like the Fifth Amendment to the United State Constitution, Article I, section 15 of the Florida Constitution provides that, "No person shall be tried for a capital crime without presentment or indictment by a grand jury." And like the requirements of 18 U.S.C. §§ 3591 and 3592(c), Florida's death penalty statute makes imposition of the death penalty contingent upon the government proving the existence of aggravating circumstances, establishing "sufficient aggravating circumstances" to call for a death sentence, and that the mitigating circumstances are insufficient to outweigh the aggravating circumstance. See Sections 775.082; 941.141, Fla. Stat.

Florida law requires every "element of the offense" to be alleged in the information or indictment. State v. Gray, 435 So. 2d 816, 818 (Fla. 1983); State v. Dye, 346 So. 2d 538, 541 (Fla. 1977). An indictment in violation of this rule cannot support a conviction; the conviction can be attacked at any stage, including "by habeas corpus." Gray, 435 So. 2d at 818.

The Sixth Amendment requires that "[i]n all criminal prosecutions, the accused shall . . . be informed of the nature and cause of the accusation . . . ." A conviction on a charge

not made by the indictment is a denial of due process. Gray, 435 So. 2d at 818 (citing Thornhill v. Alabama, 310 U.S. 88 (1940), and DeJonge v. Oregon, 299 U.S. 353 (1937)). The shielding function of the grand jury is uniquely important in capital cases. See Campbell v. Louisiana, 523 U.S. 392, 399 (1998)(recognizing that the grand jury "acts as a vital check against the wrongful exercise of power by the State and its prosecutors" with respect to "significant decisions such as how many counts to charge and . . . the important decision to charge a capital crime").

Because the State did not submit to the grand jury, and the indictment did not state, the essential elements of the aggravated crime of capital murder, Mr. Patton's rights under Article I, section 15 of the Florida Constitution and the Sixth Amendment to the federal constitution were violated. By wholly omitting any reference to the aggravating circumstances that the State would rely upon to seek a death sentence, the indictment prejudicially hindered Mr. Patton "in the preparation of a defense" to a sentence of death. Fla. R. Crim. P. 3.140.

**3.The Jury's "Advisory Recommendation."** Even if this Court were to re-define the jury's role under the Florida capital sentencing statute, Mr. Patton's death sentence still

violates the Sixth Amendment. In other words, were this Court to conclude now that Mr. Patton's death sentence rests on "findings" made by either or both the first or second sentencing juries, Mr. Patton submits that such retroactive analysis would violate the rule of Caldwell v. Mississippi, 472 U.S. 320 (1985). The fact that the sentencing jury was told that it was only returning an "advisory recommendation" and that the "final decision" rested with the judge vitiates any possible Sixth Amendment validity to the jury's advisory sentence in Mr. Patton's case.

Caldwell held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Id. at 328-29. If Mr. Patton's death sentence rests upon findings by a jury repeatedly told that its decision was only a recommendation, that death sentence violates not only the Eighth Amendment rule of Caldwell, but also the Sixth Amendment.<sup>24</sup> A "recommendation" made by persons who believe they are only making a "recommendation" is not a

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<sup>24</sup>Caldwell embodies the principle discussed by Justice Breyer in his concurrence in Ring: "I conclude that the Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death." Ring, 122 S. Ct. at 2448 (Breyer, J., concurring in the judgment).

"verdict" under the Sixth Amendment. See Sullivan v. Louisiana, 508 U.S. 275, 278 (1993) ("It would not satisfy the Sixth Amendment to have a jury determine that the defendant is *probably* guilty, and then leave it up to the judge to determine (as [In re] Winship, [397 U.S. 358 (1970)] requires) whether he is guilty beyond a reasonable doubt. In other words the jury verdict required by the Sixth Amendment is a jury verdict of guilty beyond a reasonable doubt").

Mr. Patton's resentencing jury was repeatedly told that its role was merely advisory (see e.g. RS. 635, 639, 652, 653, 668, 669, 671, 672, 673, 674, 677, 679, 680, 681, 682, 805, 3153, 3159, 3213, 3214, 3215). The trial court gave its imprimatur on this error, repeatedly informing the jury that the "final decision" as to punishment "rests solely" with the judge (RS. 380, 371-72, 581, 584, 587, 778, 101, 3266-79).<sup>25</sup>

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<sup>25</sup>On direct appeal from his resentencing proceeding, Mr. Patton's appellate counsel raised the issue of the Caldwell violations. See Initial Brief of Appellant, Patten v. State, No. 74-318, at 58 ("And, finally, State minimized or trivialized the role of the jury in the sentencing phase of this capital case in violation of the proscription of Caldwell v. Mississippi, 427 U.S. 320 (1985)"). In response, the State argued that Mr. Patton's Caldwell argument was "indicative of the quality of all the defendant's attacks on the prosecutor," and pointed to a comment by the prosecutor telling the jury that while their verdict was only advisory, it would be given great weight by the trial judge (Answer Brief of Appellee, Patten v. State, No. 74-318, at 73-74). This Court did not discuss the Caldwell issue in its opinion in Patten II. In Patten III, the Court did conclude that "the underlying

Despite defense counsel's pretrial motion requesting that the jury's role not be denigrated in such a manner (R. 518), the original sentencing jury was also repeatedly told that its role was merely advisory and a "recommendation" (see e.g. R. 1725, 1738, 1739, 1761, 1762). Due to this constitutional infirmity, it would be impermissible to retroactively infer that the jury made the requisite findings and returned a constitutionally meaningful "verdict" of death: "no matter how inescapable the findings to support a verdict might be," for a court "to hypothesize a guilty verdict that was never rendered . . . would violate the jury trial right." Sullivan, 508 U.S. at 279.

**4. Impermissible Burden Shifting under Ring.**

It would also be improper to retroactively hypothesize that the jury actually rendered a "verdict" as to the death penalty in light of the fact that Mr. Patton was required to prove the non-existence of a fact necessary to make him death-eligible. Under Florida law, a death sentence may not be imposed unless there is a factual determination that "sufficient aggravating circumstances" exist to justify imposing the death penalty.

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burden-shifting and Caldwell error claims are legally insufficient and conclusively rebutted by the record." Patton III at 395. Under Ring, these prior rulings must be revisited.

Section 921.141 (3), Fla. Stat. Because imposing a death sentence is contingent on this fact, and the maximum sentence that could be imposed in the absence of this fact is life imprisonment, the Sixth Amendment requires that the State bear the burden of proving it beyond a reasonable doubt. See Ring, 122 S. Ct. at 2432 ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment").

However, Mr. Patton's resentencing jury was instructed:

[I]t is your duty to follow the law that will now be given to you by the Court and render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty *and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.*

(RS. 3266-67) (emphasis added).

The due process clause of the Fourteenth Amendment requires the State to prove beyond a reasonable doubt every fact necessary to constitute a crime. In re Winship, 397 U.S. 358 (1970). The existence of sufficient aggravating circumstances that outweigh the mitigating circumstances is an essential element of capital first-degree murder because it is an element that distinguishes it from the crime of first-degree murder, for which life is the only possible punishment.

See Sections 775.082, 921.141, Fla. Stat. For that reason, Winship requires the prosecution to prove the existence of that element beyond a reasonable doubt.

The instruction given to Mr. Patton's jury violated the due process clause of the Fourteenth Amendment and the Sixth Amendment right to trial by jury guarantee because it relieved the State of its burden of proof. The instruction impermissibly shifted the burden of proof to the defendant. Mullaney v. Wilbur, 421 U.S. 684, 698 (1975).<sup>26</sup> In order to comply with the Eighth Amendment requirement that the death penalty be imposed only on the worst offenders, Florida adopted 921.141 as a means of distinguishing between death-eligible and non-death-eligible murder. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). Florida chose to distinguish those for whom sufficient aggravating circumstances outweigh

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<sup>26</sup>In Mullaney, the Supreme Court held that the Maine statutory scheme delineating the crimes of murder and manslaughter violated due process. The Maine law at issue required a defendant to establish, by a preponderance of the evidence, that he acted in the heat of passion or sudden provocation in order to reduce a charge of murder to manslaughter. Mullaney, 421 U.S. at 691-92. Like the Florida statute at issue here, "the potential difference in [punishment] attendant to each conviction . . . may be of greater importance than the difference between guilt or innocence for many lesser crimes." Id. at 698. The Supreme Court held that the Maine scheme unconstitutionally relieved the State of its burden to prove the element of intent. Id. at 701-02. The Florida instruction suffers the same fatal flaw.

mitigating circumstances from those for whom sufficient aggravating circumstances do not outweigh the mitigating circumstances. Id. at 8. Because the former are more culpable, they are subjected to an enhanced penalty. "By drawing the distinctions, while refusing to require the prosecution to establish beyond a reasonable doubt the fact upon which it turns, [Florida] denigrates the interests found critical in Winship." Mullaney, 421 U.S. at 698.<sup>27</sup>

**5. Improper Doubling by Jury.** Yet another reason why it is impermissible to rely on the jury's advisory recommendation to establish that a verdict within the meaning of the Sixth Amendment was returned in Mr. Patton's case is the fact that the jury was not instructed on doubling. In light of Ring, this Court's prior assessment of the doubling issue must be revisited. Prior to the resentencing, defense counsel moved on a number of occasions to prevent the State from submitting to the jury aggravators related to the same incident. In response, the State asserted that it intended to argue, *inter alia*, the aggravating factors of avoiding arrest, disruption/hindrance of the lawful exercise of governmental

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<sup>27</sup>In Patton III, the Court held that Mr. Patton's alleged burden-shifting claim was "legally insufficient and conclusively rebutted by the record." Patton III at 395. In light of Ring, this ruling must be revisited.

function, and that the victim was a law enforcement officer engaged in the performance of his official duties (RS. 3472). The State's position was that "[e]ven if the defendant is correct in his analysis that these three aggravating circumstances are the same, the Florida Supreme Court has held that this concept of 'improper doubling' *relates only to a trial judge's sentencing order and not to the instructions to the penalty phase jury*" (*Id.*) (emphasis added). Additionally, the State argued that the avoiding arrest and hindrance of a governmental function circumstances "can be separate" and thus did not violate the proscription against doubling in terms of the judge's findings of fact (RS. 3473). During the proceedings themselves, the doubling issue as to the avoiding arrest and disruption of governmental function was hotly contested by both parties.<sup>28</sup> The State conceded that the judge could not find all of the aggravators, but the proscription against doubling "is only for the judge. It is not for the jury" (RS. 2918). The State also urged that the trial court could "absolutely" consider something not argued to the jury (RS. 2921). The court also noted that "[t]here never is" a

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<sup>28</sup>The trial court had ruled that the State would not be permitted to have a jury instruction on the aggravating factor of the victim being a law enforcement officer, as the factor was not in existence at the time of the offense (RS. 2934; 2977-78).

factual determination from a penalty phase jury as to what aggravators or mitigators they found; rather, "[w]hen they come back, they come back with life or death. They don't tell me why, right? So, what difference does it make?" (RS. 2923). The defense argued that "it would be error for them to consider separately and include in their weighing, two factors, two aggravating factors supported by identical facts" (RS. 2929). The defense also argued that if the jury was going to be so instructed, the court needed to tell the jury that "[i]f they come from the same set of facts, you can't consider it double" (RS. 2930). The trial court then responded "But it doesn't really matter, because I am the one who decides that" (Id.). Finally, the defense requested a special verdict form in order for the jury "to tell us whether or not they found them both in that jury verdict" (RS. 2933). The request for a special verdict was denied (id.), as was the proposed instruction on doubling (RS. 2978).<sup>29</sup>

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<sup>29</sup>On direct appeal, this Court acknowledged that, under Castro v. State, 597 SO. 2d 259 (Fla. 1992), "when requested, a defendant is entitled to a limiting instruction advising the jury not to double the weight of multiple aggravating circumstances supported by a single aspect of the crime." Patten II at 63 n.3. The Court, however, concluded that "[i]n this case, no such instruction was requested." Id. This is factually incorrect. Defense counsel submitted a proposed instruction which made the following request:

YOU ARE NOT PERMITTED TO USE THE SAME FACTS TO

Consequently, during closing arguments, the prosecution repeatedly told the jury that it could consider and find *three* aggravating circumstances: prior violent felony, avoiding arrest, and hindrance of governmental function. See RS. 3209 ("Those *three* aggravating circumstances are there"); RS. 3209-10 ("you have to balance these *three* aggravating factors versus mitigating factors that you are reasonably convinced exist"); RS. 3210 ("The *three* aggravating circumstances that are there with those mitigating that you are considering, and you have to see what balances out"). The jury was never told it could not consider and weigh factors supported by the same facts. However, following the jury's recommendation, the

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SUPPORT MORE THAN ONE AGGRAVATING CIRCUMSTANCE.  
THEREFORE YOU ARE NOT PERMITTED TO WEIGH SEPARATELY  
AND CUMULATIVELY AGGRAVATING CIRCUMSTANCES SUPPORTED  
BY THE SAME FACTS.

(RS. 3803). The bottom of the proposed instruction reveals that it was a defense request, and "refused" is checked off (Id.). During the proceedings below, this proposed instruction was discussed at length, culminating in the following ruling by the trial court:

The defense request that you are not permitted to use the same facts to support more than one aggravating circumstance, therefore, you are not permitted to weigh separately and cumulative aggravating circumstances supported by the same facts - that request is likewise refused.

(RS. 2978).

State, in an about face, urged the trial judge to merge the avoiding arrest and hindrance of governmental function aggravators "to be very, very cautious" (RS. 3321-22). Following the State's urging, the trial court merged these two aggravators (RS. 3838).

On appeal, Mr. Patton raised, as Argument IV, that the trial court erroneously based the imposition of the death penalty on two aggravators arising from the same set of facts (Initial Brief of Appellant, Patten v. State, No. 74-318, at 58). In response, the State argued that the defense argument was "baseless dribble" because, in fact, the judge did merge the factors at issue (Answer Brief of Appellee, Patten v. State, No. 74-318, at 75). The Court rejected the doubling argument, holding that, under Suarez v. State, 481 So. 2d 1201 (Fla. 1985), the jury in Mr. Patton's case was properly given a list of "arguably relevant aggravating factors from which to choose" and that it is "[t]he judge, on the other hand, [who] must set out the factors he finds both in aggravation and mitigation, and it is this sentencing order which is subject to review vis-à-vis doubling." Patten II at 63 (quoting Suarez, 481 So. 2d at 1209). Because the trial court's sentencing order "expressly stated" that he did not give the two aggravators a doubling effect, there was no error. Id.

As noted above, the Court did acknowledge its recent decision in Castro, but erroneously held that no such doubling instruction was requested in Mr. Patton's case.

This Court's determination in Suarez, followed in Mr. Patton's case--that jury instructions on aggravating circumstances "simply give the jurors a list of arguably relevant aggravating factors from which to choose"--cannot survive the reasoning and holding of Ring and Apprendi. When jurors are determining the existence of aggravating circumstances, they are not "simply choosing" from a list those factors which are "arguably relevant." The rule of Suarez clearly contemplates that the jury's role is limited to "choosing" some factors from the list of aggravators, but that it is the judge who "must set out the factors he finds both in aggravation and in mitigation and it is this sentencing order which is subject to review vis-à-vis doubling." Suarez, 481 So. 2d at 1209. The denigration of the jury's role in the finding of the necessary elements for capital murder cannot be reconciled with Ring.

**B. CONCLUSION.** In light of the decision in Ring, Mr. Patton submits that he is entitled to habeas relief. Many of this Court's prior rulings on the various aspects of Mr. Patton's

claim must be revisited. Mr. Patton should be sentenced to life imprisonment in accordance with the original penalty phase recommendation, or to any other relief as the Court deems proper and just.

## CLAIM II

### MR. PATTON'S APPELLATE COUNSEL FAILED TO RAISE MERITORIOUS ISSUES ON DIRECT APPEAL.

#### A. INTRODUCTION.

Mr. Patton had the constitutional right to the effective assistance of appellate counsel. Strickland v. Washington, 466 U.S. 668 (1984); Evitts v. Lucey, 469 U.S. 387, 396 (1985).

#### 1. Failure to Point Out the Doubling Instruction.

As noted in Claim I, one of the issues raised on the Mr. Patton's resentencing appeal was the doubling of aggravators. On appeal, this Court decided that its decision in Castro v. State, 597 So. 2d 259 (Fla. 1992), was not applicable to Mr. Patton because no doubling instruction was requested by the defense. Patten II at 63 n.3. This is incorrect. Trial counsel did submit a proposed instruction which made the following request:

YOU ARE NOT PERMITTED TO USE THE SAME FACTS TO SUPPORT MORE THAN ONE AGGRAVATING CIRCUMSTANCE. THEREFORE YOU ARE NOT PERMITTED TO WEIGH SEPARATELY AND CUMULATIVELY AGGRAVATING CIRCUMSTANCES SUPPORTED BY THE SAME FACTS.

(RS. 3803). The bottom of the proposed instruction reveals that it was a defense request, and "refused" is checked off (Id.). The proposed instruction was discussed at length, culminating in the following ruling by the trial court:

The defense request that you are not permitted to use the same facts to support more than one aggravating circumstance, therefore, you are not permitted to weigh separately and cumulative aggravating circumstances supported by the same facts - that request is likewise refused.

(RS. 2978). To the extent that appellate counsel failed to bring to the Court's attention that the appropriate instruction was in fact made, counsel rendered prejudicially deficient performance, and Mr. Patton would have been entitled to relief under Castro.

**1. Denial of Motion to Suppress Statements.** On September 2, 1981, Mr. Patton was arrested by officers from the Miami Police Department. Defense counsel filed a motion to suppress statements, alleging significant Fifth, Sixth, and Fourteenth Amendment violations (R. 65-67). Prior to suppression hearing, the prosecutor conceded that some of Mr. Patton's statements were inadmissible (R. 197-198). At the suppression hearing, Sergeant Bohan testified to what occurred following Mr. Patton's arrest:

Q. Did there come a time when a person identified to you as Robert Patten was brought to you under arrest?

A. Yes, sir.

Q. About what time was that?

A. Approximately 5:30 P.M.

THE COURT: What date now is that?

THE WITNESS: Second September, 1981.

Q. [By Mr. Waksman] He was brought to you about 5:00 P.M.?

A. At 5:40.

Q. And about what time was it that the victim in this case, Police Officer Broom -- what time it that you saw the body of Police Office Broom in the vicinity of 3rd Avenue and 11th Street?

A. Approximately 10:00 A.M.

Q. It took about seven - seven and a half hours until Mr. Patten was arrested?

A. Yes, sir.

Q. Will you please tell us where it was you saw him, under what circumstances, Mr. Patten?

A. Robert Patten was brought into the Homicide interview room by two other detectives. After being placed under arrest, myself and Detective Hector Martinez attempted to conduct an interview with the Defendant.

Q. Tell us the first thing you said or Detective Martinez said to Mr. Patten.

A. Detective Martinez read the Defendant his Constitutional Rights from a Constitutional Rights Form.

When Detective Martinez got to the Constitutional Right stating: "Do you want an attorney to be present," the Defendant stated that, "Yes," he wanted an attorney. He was not going to answer any questions without one.

Q. Other than the one matter that Mr. Berger alluded to a moment ago, were any questions asked of Mr. Patten by you or Detective Martinez?

A. No.

After he stated he wanted his attorney present we didn't ask him any questions other than his name, date of birth and information like that for the Arrest Report.

Q. What was the next thing that happened after he said he wanted a lawyer?

A. Detective Martinez, in my presence, still in the same interview room filled out an Arrest Report.

Q. Who was in this interview room?

A. Myself, Detective Martinez, Ernest Vivian, approximately three or four minutes later, and the Defendant.

Q. Nobody else was in the room?

A. No.

Q. Were any threats, promises or coercion used upon the Defendant by you or the other two police officers?

A. No, sir.

Q. Anybody raise their voice and yell at him?

A. No, sir.

Q. How would you characterize your exchange of words between him and yourself and the other officers?

A. Just normal conversation.

Q. When Detective Martinez was preparing the Arrest Report, what, if anything, did Mr. Patten do or say?

A. He asked what the charges were.

Q. At that time I told him he was being arrested for first degree murder, armed robbery and use of a firearm in the commission of a felony.

Q. When you said this to the Defendant, did he make any response?

A. Not right away, but he looked at a wanted bulletin that Detective Martinez was using to fill out the Arrest Report.

Q. Could you tell us what this "Wanted Bulletin" was prepared for?

A. It was prepared for our unit with the picture of the Defendant, stating that he was wanted for the shooting of Officer Broom, and it gave the case number, the date and time.

Q. Was this one of the leads that you put out to the other police officers to indicate to them who you wanted arrested?

A. Correct.

It was at that time that the Defendant looked at that wanted bulletin and said something like: "Murder of a police officer, that's heavy. I'll fry for this."

Q. Was that statement made in response to any questioning by your or any other police officer?

A. No.

Q. Did the Defendant make any other statement after that one?

A. He said to Detective Martinez as Detective Martinez was writing out the Arrest Report: "That will be the last one you will do on me. I dealt" -- something -- "I dealt my last deal with this one."

Then I asked him what did he mean with "dealt his last deal" and he said something to the effect: "I will go through the bug house or clear through the electric chair, but I won't admit my guilt to you guys."

The witness later provided more detail regarding Mr. Patton's request for an attorney:

Q. Sergeant Bohan, when the Defendant requested the -- when the Defendant told you he wanted a lawyer when he was read his Miranda Rights, did he indicate an attorney by name?

A. Not right away?

Q. Did he subsequently mention the name of an attorney?

A. Yes, he did.

Q. Who was that?

A. Russell Spatz.

Q. You know who that man is?

A. Yes.

Detective Bohan further testified to statements allegedly made by Mr. Patton when the door to the interrogation room was open:

Q. Did the Defendant ever make any statements when the door was opened on any one of those occasions?

A. One time, I think when Sergeant Vivian either came to the room or was leaving, the Defendant looked out the door. His back was to the door. He turned, looked out the door. At that time I believe a Sergeant and Lieutenant Murphy were standing outside the room. At this point he says, "Oh, sure, everybody wants to look at a cop killer." At that point we closed the door again.

The detective also detailed what occurred when Mr. Patton was brought to the bathroom to urinate:

Q. Did you ever take the Defendant to the men's room?

A. Yes.

Q. What was the purpose of that?

A. He had to urinate and we also told him that we were going to take the clothes that he had on into

evidence and that we were going to give him a change of clothes in the men's room.

Q. Did you take his clothes?

A. Yes.

Q. Did you give him other clothes?

A. Yes.

Q. Did you ask one of the technicians to prepare any physical tests on the Defendant at that time?

A. Yes.

In the men's room we -- I advised the Defendant that we were going to swab his hands.

At that point as I.D. Technician Richard Badili started to swab the Defendant's hands, the Defendant said, "I know what that's for, that's for ballistics, but you won't get anything."

Detective Bohan testified that the statements allegedly made by Mr. Patton were made within the first twenty (20) minutes of his presence (R. 209), yet indicated that Mr. Patton was in his presence a total of two and one half (2 1/2) hours (R. 217). The detective explained to the court that, while the statements were made within the first twenty minutes, it was necessary to keep Mr. Patton in the interrogation room for two hours because he was waiting for Detective Martinez to finish writing the arrest report (R. 211). Detective Bohan also explained that Detective Martinez, during the two hours needed to fill out the arrest report, was using the Wanted Poster which Mr. Patton had noticed because the poster "had the date of birth of the Defendant on it, the height and weight, last known address, things like that" (R. 211).

On cross-examination, Detective Bohan affirmed that Mr. Patton asked for an attorney "[r]ight when we started to read him his Constitutional Rights" (R. 215). It was Detective Martinez who was reading the Miranda form to Mr. Patton, and Mr. Patton did not sign the form waiving his rights (R. 216). The witness acknowledged that five (5) or ten (10) minutes had passed between the first time Mr. Patton asked for his attorney, and the second request when he mentioned attorney

Russell Spatz by name (R. 216-217). Following Mr. Patton's request for Mr. Spatz, "[t]he three of us left to get him [Mr. Patton] cigarettes, to get him coffee, to get him soda, to get him water. I did not leave to call an attorney" (R. 217). During the two and a half hour period of time in which Mr. Patton was in the presence of the officers, the detective testified that they were attempting to ascertain "[j]ust his name, address, date of birth, height, weight" (R. 218), despite the fact that this was the purported reason for having the wanted poster laying on the table in front of Mr. Patton. Following the interrogation, Mr. Patton was transported to the Dade County Jail; contact was made with the booking officer at the jail, but no one ever indicated to the officer that Mr. Patton had invoked his right to an attorney. Detective Bohan did notice "scratches" on Mr. Patton's arms, but testified that he did not know "if they were track marks or not" (R. 221).

Following the testimony of Detective Bohan, no further evidence was adduced. The other law enforcement officers were never called by defense counsel to testify to their involvement in the interrogation of Mr. Patton. The trial court issued the following ruling regarding the suppression of the statements:

I believe that there were three sets of statements made concerning the police officers which was summarized or proffered through Sergeant Bohan's testimony.

Let's first take up the statements relating to the-- what I refer to as the informing him he has charges.

In that regard I find the following facts occurred: When the Defendant -- first of all, I find, as correctly stated by Defense Counsel, that when the Defendant was read his Miranda Rights at the time of his apprehension at the City of Miami Homicide office, that he invoked his right to counsel. That is unequivocal by the record and the Court commends the candidness of the police officers in their procedures in advising him of this right.

However subsequently, when the police officers were actually going through the actual booking and arrest procedures, at one point when Sergeant Martinez was preparing an arrest form -- of course, I don't have

the transcript. I'm going by my notes. He was asked by the Defendant, "What were the charges for?"

Bohan told him the charges which were basically first degree murder. There was a period of time where he said nothing I think is critical and he did not answer, in Sergeant Bohan's words, right away. He looked at the bulletin which was of him.

Then Patten said, "Murder of a police officer, that's big, I will fry for this."

And there were further comments by him, "That will be my last one. I dealt my last deal with this one."

At which point Sergeant Bohan asked what did he mean by that, then he responded, "I will go through the bug house or the chair, but I won't admit to you anything," or words to that effect.

That's the first statement.

Then, subsequently, there was a second statement made in Lieutenant Murphy's presence, Sergeant Vivian, Sergeant Bohan, with the door open to the Homicide Office he was sitting in. The Defendant looked out the door and the Defendant said, "Oh sure, everyone wants to look at the cop killer. Close the door."

At which point the police officer closed the door.

The first statement, which I will consider like what I will call the swab statement or bathroom statement occurred when he was being swabbed by the police officers during the booking procedure when he was having his clothes taken off because they were trying to get information or evidence from it. At which point he said in Richard Badali's presence, "I know what that's for and you won't get anything."

So, basically, we are concerned with three sets of statements to the police officers.

My conclusions of law are as follows: Under Miranda versus Arizona, 384 U.S. 474, repeat, 384 U.S. 474, I agree with Defense Counsel when the right to counsel is raised by the accused it is the responsibility of those charged with his custody to see to it that he obtains an attorney and until that obligation is discharged the interrogation must be suspended.

In this case, the testimony shows that Mr. Patten sought to consult with his attorney and expressed his desire not to provide a statement.

Moreover, he did so in a custodial setting. Under these circumstances, the police should not have pursued their interrogation until an attorney was present and, indeed, the police officers did not pursue an interrogation.

Here the police proceeded only to perform routine functions necessary to complete the standard "Arrest and booking procedures," to-wit: advise the Defendant of the charges at his request and fingerprinting him. There was no further interrogation in the meaning of interrogation as defined in Miranda and Innis.

And for the record, I would like to quote first from Innis which I think is critical. I quote from -- strike that -- Rhode Island versus Innis, the following:

"The term `Interrogation' under Miranda refers not only to express questioning, but also to any words and actions on the part of the police officers," and underlined it, "other than those normally attended to arrest and custody."

Moreover, in the case of Edwards versus Arizona, the following definition is given:

"An accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the

accused, himself, initiates further communication, exchanges or communications with the police."

In the present case I make the following factual findings: Number one, the procedures involved herein were those normally intended for arrest and custody procedures.

Number two, except for the one remark made by Bohan and his response, the police would not reasonably expect this statement to be made.

Number three, the Defendant initiated all statements without interrogation by the police.

Number four, that all statements were made freely and voluntarily and spontaneously by the Defendant.

Therefore, as to the statements made by the police officers, with the exception of the statement to in response to Sergeant Bohan, the Motion to Suppress is denied on that ground.

As to the statements made to the lady involved, Carolyn Beaver, Department of Corrections, they are all suppressed as the State has stipulated; however, I find all statements were freely and voluntarily made under Harris versus New York.

(R. 435-40).

The court's ruling stands in contrast to the law. In McNeil v. Wisconsin, 111 S. Ct. 2205 (1991), and Minnick v. Mississippi, 111 S. Ct. 486 (1990), the Court clarified its earlier holding in Edwards v. Arizona, 451 U.S. 477 (1981), a case relied upon by the trial judge. "The issue in the case before us is whether Edwards protection ceases once the suspect has consulted with an attorney." Minnick, 111 S. Ct. at 488. In Minnick the Supreme Court's 6-2 majority concluded that:

Further, an accused who requests an attorney, "having expressed his desire to deal with the police through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused

himself initiates further communication, exchanges, or conversations with the police."

Minnick, 111 S. Ct. at 489.

In McNeil, the Court held:

In Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), we established a second layer of prophylaxis for the Miranda right to counsel; once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U.S., at 484-485, 101 S.Ct. at 1884-1885--which means, we have most recently held, that counsel must be present, Minnick v. Mississippi, 498 U.S. ----, 111 S. Ct. 486, 112 L.Ed.2d 489 (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, ----, 108 L.Ed.2d 293 (1990). The Edwards rule, moreover, is not offense-specific; once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).  
111 S. Ct. at 2208 (emphasis added).

Mr. Patton's statements must be suppressed as violative of Edwards as explained in Minnick and McNeil. Thus, appellate counsel's failure to raise--on either the original appeal or the resentencing appeal--the denial of Mr. Patton's motion to suppress was prejudicially deficient performance, and habeas relief is warranted.

**2. Failure to Raise Proportionality.** Appellate counsel unreasonably failed to raise the issue of proportionality in both the original appeal and the

resentencing appeal.<sup>30</sup> To a certain extent, this Court also erred in failing to address the issue *sua sponte*, as it is the independent duty of the Court to conduct such an analysis whether raised by counsel or not. See Ocha v. State, 2002 Fla. LEXIS 1398 (Fla. June 27, 2002); Morton v. State, 789 So. 2d 324, 334 (Fla. 2001). Indeed, proportionality review is a "unique and highly serious function of this Court, the purpose of which is to foster uniformity in death-penalty law." Tillman v. State, 591 So. 2d 167, 169 (Fla. 1991). To the extent that this Court erred in carrying out its duty to review Mr. Patton's sentence for proportionality, Mr. Patton did not receive the appellate review to which he was constitutionally entitled. See Parker v. Dugger, 111 S. Ct. 731 (1991).

"The death penalty is reserved only for those cases where the most aggravating and least mitigating circumstances exist." Morrison v. State, 818 So. 2d 433 (Fla. 2002). By any definition, Mr. Patton's case does not fall in the class of cases that can be classified as the "most aggravating" and "least mitigating." While not discounting the severity of the death of a law enforcement officer, that fact alone does not make the crime the "most aggravating" and "least mitigating" of all crimes for which the death penalty has been imposed. See, e.g. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988). A proper proportionality analysis "requires a discrete analysis of the fact," Terry v. State, 668 So. 2d 954, 965 (Fla. 1996), and a qualitative, as opposed to a quantitative, review of the aggravation and mitigation. Ocha, supra, at \*23.

In Mr. Patton's case, the trial court found two aggravating circumstances: prior violent felony (a 1975 armed robbery and a contemporaneous conviction for armed robbery), and the hindrance of the lawful exercise of a governmental function (RS. 3838). The court noted that the defense had presented evidence of statutory mitigation, although the court rejected such evidence (RS. 3839). The trial court also found that Mr. Patton was abused as a child and had abused drugs (Id.).<sup>31</sup> In light of the record and the substantial mitigation

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<sup>30</sup>The failure to raise the issue of proportionality during the original proceedings was particularly prejudicial, as the remedy would have been the entry of a sentence of life imprisonment, as opposed to the jury resentencing ordered by the Court based on the error it found.

<sup>31</sup>The court concluded that "child abuse many years before did not make Mr. Patten kill Officer Broom" (Id.). The court's failure to acknowledge the mitigating nature of the

presented by the defense, Mr. Patton submits that the death sentence should be vacated as being disproportionate. Appellate counsel's failure to raise this issue was prejudicially deficient under the Strickland standards, and, accordingly, habeas relief should issue.

**CONCLUSION**

Based on the foregoing arguments, Mr. Patton respectfully requests that the Court issue the writ of habeas corpus in his case, or any other relief as deemed just and proper.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to Sandra Jaggard, Assistant Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue, Miami, Florida, 33131, on this 4th day of October, 2002.

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TODD G. SCHER  
Special Assistant CCRC-South  
Florida Bar No. 0899641  
555 NE 34<sup>th</sup> Street, #1510  
Miami, Florida 33137  
Tel: 305-576-3221

Suzanne Myers  
Assistant CCRC-South  
Florida Bar. No. 0150177  
OFFICE OF CAPITAL COLLATERAL  
REGIONAL COUNSEL-SOUTH  
101 NE 3d Avenue, Suite 400

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kind of severe child abuse that Mr. Patton endured, and its insistence that the child abuse has to have "made" Mr. Patton commit the killing, was improper. "Clearly, Florida law does not require that a proffered mitigating circumstance have any specific nexus to a defendant's actions for the mitigator to be given weight." Cox v. State, 819 So. 2d 705, 722 (Fla. 2002).

Ft. Lauderdale, Florida 33301  
Tel: 954-713-1284

COUNSEL FOR PETITIONER

**CERTIFICATE OF COMPLIANCE**

The undersigned counsel certifies that this petition is  
typed using Courier 12 font.

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TODD G. SCHER  
COUNSEL FOR APPELLANT

